Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 593.

JAMES B. MAGENIS, F. W. APPLESTEIN, CHARLES A. BODIE ET AL.,
Petitioners,

v.

BOSTON RAILROAD HOLDING COMPANY ET AL.

BRIEF ON BEHALF OF RESPONDENT NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY IN OPPOSITION TO ALLOWANCE OF PETITION.

This petition relates to the same case in the Supreme Judicial Court of Massachusetts as the petition of the Delaware and Hudson Company, docket number 567, presently pending before this Court. We submit that this petition should be denied upon two independent grounds: first, that the case is not one which merits the consideration of this Court, and second, that the petitioners have no standing to maintain it. The reasons for the first ground are all set forth in the brief in opposition which we have already filed in number 567. There can be no occasion to repeat them here, so we ask leave to refer the Court to that brief. This brief will be limited to the second point.

THE PETITIONERS HAVE NO STANDING.

We have found no case dealing with a petition for certiorari brought under the post-1916 practice by a person not a party to the suit in which the decree in question was entered. It is, however, settled that a person not a party may not appeal to this Court.

> *Guion* v. *Liverpool, London, & Globe Insurance Co.*, 109 U.S. 173.

And a stockholder in a corporation whose property is being foreclosed and who, consequently, has precisely the same substantial interest in the subject matter of the suit as these petitioners do cannot appeal where he has been denied the right to intervene in the trial court.

> *Ex parte Cutting*, 94 U.S. 14.

Further, a person whose rights are collaterally affected by a decree may neither appeal nor have certiorari.

> *Ex parte Leaf Tobacco Board of Trade of the City of New York*, 222 U.S. 578.

(This was before the change in practice from appeal to certiorari in 1916.)

These are direct authorities against the present petition. *Ex parte Cutting* is particularly close, since there the petitioners had moved to intervene and their motion had been denied by the Circuit Court just as the similar motion by the present petitioners has been denied by the Supreme Judicial Court. The fact that this denial was without prejudice (rec. p. 10) does not change the situation. The important point is that the petitioners were not admitted as parties and such an admission is essential to provide *locus standi* to maintain a petition for certiorari. It was

entirely appropriate for the denial to be made without prejudice since, conceivably, further proceedings might be taken in the Supreme Judicial Court with reference to which the petitioners might desire to intervene.

The order made on January 29, 1952, by Mr. Justice Frankfurter (Exhibit "B," rec. p. 9) clearly recognized the necessity that the petitioners be admitted as parties in order to maintain their petition for certiorari. That order states that it was entered "on the assumption that the Supreme Judicial Court of Massachusetts will act expeditiously on the motion, relevant to the disposition of this application, to be brought before it on February 6, 1952." If, as the petitioners apparently maintain, the action of the Supreme Judicial Court on the motion to intervene was of no consequence whatever as far as their petition for certiorari was concerned, there could have been no occasion for this recital in Mr. Justice Frankfurter's order.

THE POSITION OF THE PETITIONERS WITH REFFRENCE TO THE LITIGATION.

Conceivably it might be suggested that the petition could be treated as carrying with it an application to this Court to permit intervention for purposes of the petition. This would not be appropriate, for several reasons.

In the first place, such an application would have to be filed in a proceeding pending in this Court. The petition in number 567 is properly before the Court, so the current petition on any such theory should have been filed in number 567 and not as a separate petition. Further, there is no possible occasion for multiplying the parties in this Court. Any relief granted to the Delaware and Hudson Company, petitioner in number 567, would necessarily enure fully to the benefit of the present petitioners quite as much as any relief granted on the present petition itself.

Finally, the facts with reference to these particular petitioners are not such as to commend them to the discretion of the Court. It is apparent that the entire litigation is a speculative enterprise on the part of the holders of the guaranteed stock. When the case was first here (336 U.S. 932), it appeared that as early as 1944 an alliance was made amongst stockholders to use their stock to obtain a dissolution of the Boston Railroad Holding Company and that they had entered into a formal escrow agreement looking toward that end. The Delaware and Hudson Company, petitioner in number 567, was a party to that agreement. These allies were successful in obtaining the passage of the 1946 statute dissolving the Holding Company. That statute was passed in the middle of 1946 and the litigation commenced in July, 1947, with the original petition which was the basis for the proceeding which was dismissed by this Court at 336 U.S. 932. That case was argued in the Massachusetts court in April of 1948 and was decided in October of 1948. The receiver was appointed in June of 1949 and the second petition of the Delaware and Hudson Company, which is the basis of the present petition for certiorari, was brought in December of 1949. It was argued in the Massachusetts court in April of 1951 and was decided by that court in November of 1951. Reference to the schedule of stockholdings and dates of acquisition, printed at pages 5-8 of the record (eliminating the stockholders who joined in the motion in the Massachusetts court but do not join in the petition in this Court), shows that of 2194 shares represented all but 140 were purchased in or after 1946, and, of the 140, 50 shares were owned by a stockholder who materially increased his holdings thereafter and bought shares as late as June, 1951. Breaking the holdings down into years, it appears that 140 shares were acquired in 1946, 35 in 1947, 382 in 1948, 46 in 1949, 260 in 1950, and 1191 in 1951, so that it is

entirely apparent that these petitioners were more interested in buying into litigation than in buying stock. It is interesting to observe that, of the 1191 shares purchased in 1951, 100 shares, which is the second largest single purchase shown, were bought on November 13 after the decision of the Massachusetts court which is attacked by the petition.

Further, it is appropriate that the Court's attention be called to the fact that two of the petitioners, C. P. Boyce and Edward F. Williams, are directors of the New York, New Haven & Hartford Railroad Company. This does not appear on the record but it seems to us that it is appropriate to state it in this brief since it was only upon the filing of the petition in this Court that the fact became pertinent, and there is no opportunity for pleading in which to raise the point. Mr. Williams is shown in the petition as holding 419 shares and the dates of acquisition given at page 7 of the record show that all were purchased in 1951. Mr. Boyce is shown as holding 100 shares, which, it appears at page 5 of the record, he purchased in 1947 and 1948 and his partnership and corporation, Stein Bros. & Boyce and Stein Bros. & Boyce Co-op, shown at page 10 of the petition as holding 377 and 100 shares, respectively, purchased in 1950 and 1951. We can see no occasion why the Court should feel sympathy for petitioners who speculate in litigation.

We ask the Court to deny the petition.

Respectfully submitted,

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